

NTSB Order No.  
EM-149

UNITED STATES OF AMERICA  
NATIONAL TRANSPORTATION SAFETY BOARD  
WASHINGTON D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington D. C.  
on the 24th day of October 1988

PAUL A YOST, Commandant, United States Coast Guard,

v.

OLNEY M. WARDELL, APPELLANT.

Docket ME-131

OPINION AND ORDER

Appellant challenges a July 20, 1987 decision of the Vice Commandant (Appeal No. 2455) affirming a three month suspension of his merchant mariner's license (No. 005815) that was ordered by Coast Guard Administrative Law Judge Roscoe H. Wilkes on March 5, 1986 following a four-day evidentiary hearing completed on November 7, 1985.<sup>1</sup> The law judge had sustained a charge of negligence on a specification that alleged, in effect, that as a result of appellant's failure, while serving as pilot aboard the S.S. GREAT LAND on March 17, 1985, to properly navigate the vessel, it had collided with Terminal 3 of the Port of Anchorage City Dock. On appeal to the Board, the appellant contends that the Coast Guard's finding of negligence should be over turned because it is both procedurally flawed and unsupported by the reliable, probative and substantial evidence in the record and, further, because the sanction imposed by the law judge overly severe.<sup>2</sup> For the reasons that follow, we will deny the appeal.

Before turning to the legal issues discussed in the parties' briefs, we think it would be helpful to review the circumstances of this casualty in light of the evidence in the record on how a vessel such as the GREAT LAND normally would be docked at

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<sup>1</sup>Copies of the decisions of the Vice Commandant (acting by delegation) and the law judge are attached.

<sup>2</sup>The Coast Guard has filed a reply opposing appellant's appeal.

Anchorage.<sup>3</sup> In this connection, we think the Vice Commandant's decision (p. 2-3) accurately summarizes what both parties appear to agree constitute the essentials of a proper navigation into the Port of Anchorage:

"Cook Inlet in the vicinity of Anchorage runs generally northeast and southwest. To moor a vessel the size of the GREAT LAND port side to the Anchorage city dock, the vessel must proceed from a turn to port at Point Mackenzie to a point off the dock approximately one mile, with a microwave tower near the dock on a turn bearing 115-120 degrees true and the vessel heading approximately 030 degrees true. At that point the vessel must commence a hard turn to starboard which will bring it alongside the dock after a turn of approximately 180 degrees. It is important that the vessel be in the appropriate position at the beginning of the turn before reaching the dock. Once this turn for the dock is started, the vessel is committed to completing the turn, and cannot abort the maneuver without a serious risk of grounding."

On the date in issue, the vessel was unable, for reasons over which the parties disagree, to complete the starboard turn without striking the dock. Again, in the words of the Vice Commandant (id. at 3-4):

"During the turn, Appellant realized that the GREAT LAND was not turning fast enough to make the mooring. He ordered the engines put at full speed ahead in an effort to increase the rate of turn of the ship. When appellant realized that the ship still was not going to make the turn in the available maneuvering room it was already too late to avoid hitting the dock. Appellant ordered the engines put full astern, radioed the supervisor ashore to clear the dock, and headed the ship into the dock to avoid hitting a ship already moored ahead."

At the hearing, the Coast Guard sought to establish that the vessel did not successfully negotiate the turn because it was initiated at a point that was too close to the dock. It maintained that the reason for the vessel's being out of proper position for the turn was appellant's negligence in relying on his "seaman's eye" to navigate the vessel rather than on plotted fixes of the vessel's track and other navigation aids. The appellant, in defense of his navigation, maintained, and put on evidence to show, that the vessel was not off-track when it started the turn. He contended that vessel's failure to make the turn in a space that

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<sup>3</sup>The S.S. GREAT LAND is a 744 foot long "roll-on/roll-off" freight vessel.

had been sufficient on numerous past occasions must have been due to the effects of an unforeseeable current encountered after the turn was in progress.

With the exception of appellant's challenge to the sanction ordered by the law judge, all of his arguments relate to the law judge's findings of actual negligence on appellant's part in navigating the vessel. We find it unnecessary to rule on those arguments. The charge of negligence found proved in this proceeding rests not only on findings that appellant's navigation of the vessel was deficient in certain regards, but also on the conclusion that appellant, in defending against the charge, failed to rebut the presumption of negligence the vessel's allision with the dock raised<sup>4</sup>. Because we agree with that conclusion, we need not determine whether the evidence in the record established actual negligence or whether the law judge's judgment that it did reflected the erroneous consideration both of evidence relevant to a dismissed specification and of evidence the investigating officer prosecuting the matter for the Coast Guard produced through his testimony and exhibits.

Appellant asserts that but for the effect of the current encountered during the starboard turn to the port the vessel would have completed the maneuver successfully. He contends, in this connection, that the adverse current provides a "non-fault explanation" for the allision that, within the meaning of our decision in Commandant v. Jahn, NTSB Order EM-88 (1981), rebutted the presumption of negligence. We do not agree.

In Jahn, we concluded that the appellant had negated the presumption of negligence his vessel's collision with a navigation beacon had been raised because he produced evidence "that the presumptively blameworthy occurrence could have resulted from factors other than his alleged negligent operation" (id. at p. 2). Specifically, the appellant in Jahn established that the uncontrollable sheer into the beacon that his vessel experienced could have been caused by oversteering by the helmsman or by uncharted shoaling in the area of the channel where the sheer had occurred.<sup>6</sup> These factors were exculpatory of the appellant because

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<sup>4</sup>We find no merit in appellant's contention that because the law judge found actual negligence he did not or could not also rely on the presumption of negligence.

<sup>6</sup>Although there was no evidence in Jahn that the helmsman had oversteered the vessel, evidence did establish that there was uncharted shoaling. We would not have found that the presumption of negligence in Jahn had been rebutted had the appellant shown

of his management of the vessel's navigation essentially would be unimpugned if either or both had in fact caused the sheer. In the instant case, by contrast, the possibility that a flood current acting on appellant's vessel kept it from turning as rapidly or as sharply as necessary would not, without more, exonerate him from responsibility for the ensuing allision.

Wholly apart from a pilot's presumed knowledge of, and ability to handle, currents within his areas of expertise, a vessel's proper management invariably and continuously involves in formed judgements respecting the impact of currents on effective navigation. Consequently, the fact that a current may have precluded the successful completion of a turn does not, in itself, provide any basis for assessing, much less for excusing the possibly deficient, performance that his vessel's pilot. We think, rather, that in order for a pilot to overcome the presumption of negligent performance that his vessel's allision with a fixed object has created, the seaman must, where he attributes the allision to unmanageable currents "embarassing" his navigation, show not only that the vessel due to the effect of the current could not have been navigated so as to avoid the allision once the turn was begun, but also that the effect of the current could not have been foreseen and compensated for through the exercise of prudent seamanship before the turn was initiated. Although the parties are in relative agreement that the appellant did all that he could reasonably be expected to have done when, having starting his turn, he realized that a casualty if some order was inevitable, because the vessel did not come around as desired, we find no showing in the record that, in light of the information concerning the strength and direction of the flood tide known or available to the appellant before the turn, appellant could not have anticipated that completing the turn would be difficult, if possible at all, or that he could not have taken steps before the turn to counteract the current's likely impact.

It is uncontroverted on the record that appellant was not only fully aware, as he brought the GREAT LAND up Cook Inlet toward Knik Arm, that the following flood tide was setting the vessel to the east of his desired track, he made three course corrections in an attempt to correct for that movement of the vessel toward the dock.<sup>7</sup> While the evidence of record is in conflict as to whether

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only that oversteering could have accounted for the sheer. Some evidence that the vessel had in fact been oversteered would have been necessary.

<sup>7</sup>Appellant had been advised by a company official at the dock that the current was slightly stronger than normal. The

the vessel was significantly closer to the dock than normal when the starboard turn was initiated, there is no dispute that, due to the course corrections, the heading of the vessel was more than twenty degrees north of the heading from which this turn was customarily made (007 degrees true rather than 030 degrees). Appellant nevertheless attempted to make the longer than normal turn (more than 200 degrees rather than about 180 degrees) across and back into the flood tide without allowing any additional maneuvering room between his turning point and the dock.<sup>8</sup> Moreover, contrary to his suggestion that an unknown, unforeseeable current embarrassed his navigation, there is no evidence that any current save the flood tide, through which he had been navigating for some time, was a factor bearing on the success of the maneuver.<sup>9</sup> In these circumstances, it is difficult to escape the conclusion that the turn's unsuccessful outcome resulted from, at best, a miscalculation of the extent to which a current of more or less known parameters would influence the vessel's navigation through the turn. In any event, we are not persuaded that appellant produced evidence of a "non-fault" explanation for the allision. Absent such a showing, the presumption remained unrebutted, and the Coast Guard was not obligated, in order to have the charge of negligence sustained, to prove how appellant's conduct failed to satisfy the standard of care applicable to his pilotage of the vessel.

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vessel's master had calculated the strength of the current at 3.2 knots, which comported with NOAA published predictions for the date in question.

<sup>8</sup>As the Coast Guard cogently argues on brief (at p. 23): "Coming to course 007 caused the vessel to experience the effects of the current, not from astern or slightly on the port side where it would be on normal approaches, but rather at least 23 degrees more on the port quarter....This would cause the vessel to be set off course in the direction of the current. Similarly, it would impede, to some degree, the vessel's ability to turn, because the vessel must fight the effect of the current for the additional 23 degrees until the vessel has turned sufficiently to allow the current to assist the vessel in completing the turn."

<sup>9</sup>Compare, Commandant v. Pitts, NTSB Order EM-98 (1983), in which the presumption of negligence was found unrebutted where, inter alia, no evidence was advanced to show that the appellant had "experienced currents of a magnitude or from a direction he could not or should not have reasonably foreseen would exist where he in fact made his turn" (id. at p. 3).

Appellant's challenge to the sanction imposed by the law judge in effect asks us to review his assessment of the weight to be given various mitigating factors, such as appellant's prior clear disciplinary record.<sup>10</sup> We decline the invitation to second guess the law judge in this highly subjective area. Without some showing, not made here, that a sanction is plainly out of line with precedent involving similar facts, we think it would be inappropriate to disturb a judgement on sanction that, like the one before us, is well within the range for an appropriate suspension under the guidance given to law judges in 46 CFR §5.569(d).<sup>11</sup>

ACCORDINGLY, IT IS ORDERED THAT:

1. The appellant's appeal is denied, and
2. The orders of the Vice Commandant and the law judge imposing a three-month suspension of appellant's mariner's license are affirmed.

KOLSTAD, Acting Chairman, BURNETT, LAUBER, NALL, and DICKINSON, Members of the Board, concurred in the above opinion and order.

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<sup>10</sup>Although not directly raised on appeal to the Board, the appellant on appeal to the Vice Commandant argued that the law judge should not have considered the extent of monetary damage to the vessel and city dock in determining sanction. Although we do not find the weight he did accord it would justify disturbing the sanction he imposed, we are not persuaded by the Coast Guard's argument on brief to us that the matter of damages is properly considered a factor in aggravation under 46 CFR §5.569(b).

<sup>11</sup>46 CFR§5.569(d) indicates that a license suspension of from 2 to 6 months for negligence in performing duties related to vessel navigation would be appropriate.